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Symposium: Building the Arc of Justice: The Life and Legal Thought of Derrick Bell: Foreword

Matthew H. Charity

Western New England University School of Law, mcharity@law.wne.edu

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SYMPOSIUM

BUILDING THE ARC OF JUSTICE: THE
LIFE AND LEGAL THOUGHT OF
DERRICK BELL

MATTHEW H. CHARITY*

I know you are asking today, “How long will it take?” Somebody’s asking, “How long will prejudice blind the visions of men, darken their understanding, and drive bright-eyed wisdom from her sacred throne?” Somebody’s asking, “When will wounded justice, lying prostrate on the streets of Selma and Birmingham and communities all over the South, be lifted from this dust of shame to reign supreme among the children of men?” Somebody’s asking, “When will the radiant star of hope be plunged against the nocturnal bosom of this lonely night, plucked from weary souls with chains of fear and the manacles of death? How long will justice be crucified, and truth bear it?”

I come to say to you this afternoon, however difficult the moment, however frustrating the hour, it will not be long, because “truth crushed to earth will rise again.”

* Associate Professor of Law, Western New England University School of Law. I thank all those who participated in and planned this symposium, including its sponsors, the Western New England University School of Law Center for Gender and Sexuality and the Western New England Law Review. I would especially recognize Professor Bridgette Baldwin, who suggested in a smaller group of our faculty that we, as a group, revisit the works and thinking of Professor Derrick Bell, and titled our conference “Building the Arc of Justice.”

How long? Not long, because “no lie can live forever.”
How long? Not long, because “you shall reap what you sow.”
How long? Not long:
Truth forever on the scaffold,
Wrong forever on the throne,
Yet that scaffold sways the future,
And, behind the dim unknown,
Standeth God within the shadow,
Keeping watch above his own.
How long? Not long, because the arc of the moral universe is long,
but it bends toward justice.¹

FOREWORD

I am pleased that the Western New England Law Review has given us the opportunity to celebrate the life, and to reflect on the life and teachings, of Derrick Bell. This Symposium issue follows on varied presentations, discussions, and remembrances presented at the symposium “Building the Arc of Justice: The Life and Legal Thought of Derrick Bell.” The Symposium occurred on September 30, 2012, approximately one year after the passing of Professor Bell on October 5, 2011, and brought together scholars who had been touched by his work as members of the legal academy, as law students, and as individuals engaged in our society in general.

It was touching to see not only how important Professor Bell’s work has been and continues to be in contemplating and understanding the law’s relationship with subordination based on race and other characteristics (ethnicity, class, sex, sexual identity), how thorny the bramble bush of law becomes when adding in voices, experiences, fears, and realities not taken as central to the legal canon; but also how Professor Bell reached his students, his colleagues, the academy, and contributed to national dialogue.² While Professor Bell was, and perhaps

1. Dr. Martin Luther King, Jr., *Our God is Marching On!*, Speech delivered in Montgomery, Alabama (Mar. 25, 1965) (transcript available in the King Papers at the Martin Luther King, Jr. Research and Education Institute), *available at* http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/our_god_is_marching_on/ (last visited May 11, 2014).

2. Professor Bell’s work and thinking reflect not only years of his own work, but a multitude of references to social science, philosophical and legal articles, as well as court decisions that might fly in the face of notions of law as a tool of equity and justice. While one need not agree with each conclusion stated by Professor Bell, I fear I do his work a disservice by not distinguishing what might be considered conclusory statements from his well considered and well cited suggestions and conclusions. In so doing, his references to the excellent research of Kimberlè Crenshaw, Patricia Williams, Mari Matsuda, Jerome Culp, Angela Harris, Richard Delgado, Jean Stefancic, Paulette Caldwell, Peggy Davis, Lani Guinier, Gerald Torres, Robert Williams, and many others (Frederick Douglass, bell hooks,

is, best known as a proponent of Critical Race Theory, we cannot consider that theory in a vacuum. As Professor Bell made clear in his teaching, his writing, and his living, the application of law must have in mind the practical effect of its implementation.

It is important to note that the practical effect of any particular law's implementation will vary, and, whether those who draft or implement laws are well intentioned or not, that law may not leave us—as individuals, as members of particular groups, or as society on the whole—better off. A relatively simplistic approach and a predilection toward a majoritarian perspective would suggest that political processes and free speech would remedy the harms of a law that does more bad than good. And yet, Professor Bell suggests that, notwithstanding perceived incremental gains, many who had relied on remedies through civil rights litigation found themselves freed by law, but subjugated in fact—a pattern of oppression not so much reasserted as never fully escaped in the first instance.³ Bell noted Jennifer Hochschild's conclusion on the continued viability of racism, demonstrating:

“[T]hat racism is not simply an excrescence on a fundamentally healthy liberal democratic body, but is part of what shapes and energizes the body.” . . . “[L]iberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues. The apparent anomaly [of racism noted as a moral lag in Gunnar Myrdal's 1944 *An American Dilemma*] is an actual symbiosis.”⁴

Ralph Ellison, Toni Morrison, Langston Hughes, etc.), have also been omitted. Please note that the lapse is material, in that Professor Bell's analyses derive from, and contribute to, a rich discourse reflecting a counter to a perceived pessimism in the notion of racism's permanence; but that the reader's reference to Professor Bell's work might remedy that defect.

3. DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3 (1992). Bell noted,

the civil rights gains, so hard won, are being steadily eroded. Despite undeniable progress for many, no African Americans are insulated from incidents of racial discrimination. Our careers, even our lives, are threatened because of our color. Even the most successful of us are haunted by the plight of our less fortunate brethren who struggle for existence in what some social scientists call the “underclass.” Burdened with life-long poverty and soul-devastating despair, they live beyond the pale of the American Dream. What we designate as “racial progress” is not a solution to that problem. It is a regeneration of the problem in a particularly perverse form.

Id.

4. *Id.* at 10 (quoting JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA* 5 (1984)).

And, assuming that the issue of equality is not an issue that can be settled in one fell swoop through litigation or legislation, Bell sets out a proposition he notes:

[W]ill be easier to reject than refute: *Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance.*⁵

These patterns of dominance certainly reflect Professor Bell's concerns regarding racism within the United States, but also reflect his understanding that knowledge about racism would not preclude using that knowledge to help others at the more precarious end of a relationship with entrenched power.

Much of the discussion at the symposium, and much of this symposium issue, has focused on Derrick Bell's work concerning law and race. However, as Professor Francisco Valdes notes, the work of Professor Bell calls on us to look beyond one perspective. Indeed, in "A Law Professor's Protest,"⁶ Professor Bell stated:

I truly believe that analysis of legal developments through fiction, personal experience, and the stories of people on the bottom

5. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 3, at 12. Indeed, Bell touches on this notion of defying the insurmountable odds in the preface to this book, and its epilogue. In the preface, he discusses the calls for struggle of Paulo Freire, Albert Camus, Frantz Fanon, and Dr. Martin Luther King, Jr. In explaining his own outlook, Bell writes of Dr. King's reaction to adversaries who expected Dr. King to respond to frustrations by hardening into a grim and desperate man. "They fail, however, to perceive the sense of affirmation generated by the challenge of embracing struggle and surmounting obstacles." MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 314 (James Melvin Washington, ed., 1986). In the epilogue, which Bell titled "Beyond Despair," Bell cites to the work of a former student and research assistant, Erin Edmonds, as concluding:

[I]t is not a matter of choosing between the pragmatic recognition that racism is permanent no matter what we do, or an idealism based on the long-held dream of attaining a society free of racism. Rather, it is a question of *both, and*. Both the recognition of the futility of action—where action is more civil rights strategies destined to fail—and the unalterable conviction that something must be done, that action must be taken.

BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 3, at 199 (citing Erin Edmonds, Civil Rights According to Derrick Bell (unpublished manuscript)). The hope in contesting a perceived permanent issue therefore both predates Bell's own analyses, and, to the extent that Bell's students might carry out the struggle against racism's permanence, carries on beyond Bell's own work. The proposed praxis, then, of Bell's recognition of oppression is the continued (and perhaps continual) struggle against oppression.

6. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 3 at 127-46.

illustrates how race and racism continue to dominate our society. The techniques also help in assessing sexism, classism, homophobia, and other forms of oppression. In fact, a good deal of the writing in critical race theory stresses that oppressions are neither neatly divorceable from one another nor amenable to strict categorization.⁷

Each of the following articles is able to build on Professor Bell's challenges to the permanence of racial domination, to the potential limitations of good will inherent in the concept of interest convergence,⁸ and to the question of the permanence not just of racism, but of other systemic biases since recognized, written on, and litigated.

Professor Geiza Vargas-Vargas looks at the writings of Bell, and situates racial identity within a power matrix controlled by the identifier, but felt by the identified.⁹ In looking at the treatment of African Americans in Bell's parable, "*The Space Traders*," Vargas-Vargas locates the gaze of the alien on Blacks as commodifying; but, that gaze is also placed on the Black population by the majority White population, which is either willing to agree to the commodification, or is willing to recognize a commodification that has existed since prior to recognizing Black personhood. This differentiation allows for the dispossession of Black populations of a place within the United States, for the disposition from person to commodity, and for the disposal of the Black population. Vargas-Vargas then looks at the example of George Zimmerman, the man who shot and killed 17-year-old Trayvon Martin in Florida claiming to have stood his ground at the perceived threat, and how the perception of a Latin@ identity might have disrupted the view of a Black/White binary in discussing the racial animus that may have been introduced into the discussion.

Professor Danné Johnson approaches the question of what might have been perceived as progress in the recognition of relationships between freedmen, where slave marriages were not only legally

7. *Id.* at 144-45.

8. Professor Bell described the concept of interest convergence in the context of looking back after twenty-five years on the basis for the *Brown v. Board of Education* decision; the Harvard Law Review printed his analysis in Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

9. Professor Vargas-Vargas references the subtext of the gaze as one "of pleasure, objectification, and sexualization . . . [o]f marking the body with a story or a narrative as designed by the source and superimposed on the object, such that the story becomes natural and truth." Geiza Vargas-Vargas, *Latin@s, Disrupting Racial Normativity in Derrick Bell's The Space Traders*, 36 W. NEW ENG. L. REV. 128 (2014) (citing FRANTZ FANON, *BLACK SKIN WHITE MASKS* (Charles Lam Markmann trans., 1967)). This suggests a presumption that the gaze is within the power of the objectifier/reifier, with the object of the gaze feeling/experiencing the reifier's alien view, and becoming, itself, what the viewer wishes the object to be.

uncognizable, but where owners could subject them to termination through sale or other disposal of chattel property.¹⁰ Looking at the marriages through an interest-convergence lens, however, depicts various interests perhaps better served by the marriages, while for the freedmen, the marriages have the appearance of value neutrality. This analysis raises questions both with regard to progress made during Reconstruction, as well as on-going state interests in control over the marriage franchise. Professor Johnson shows the continuing viability of interest-convergence in reaching new understandings of previously received historical fact.

Continuing with Professor Bell's interest-convergence dilemma, Professor Sudha Setty looks to explain changes to rules on targeted killings by unmanned aerial vehicles.¹¹ While not framed as a race concern, the discourse around the targeted killings does not gain traction when the victims are perceived to be lawful targets, even though the federal government has not disclosed the process by which the targets were chosen, and no legal remedy has existed for those who may be on kill-lists. Professor Setty suggests that there exist potential spaces in which the interests of those with power in the United States government and those potentially subject to targeted killing overlap, and those spaces, however small, allow for a discourse that might create a remedy where no remedy is now available. This use of interest-convergence raises issues of power dynamics both nationally and internationally, in the intersections of nationality, race, ethnicity, and religion.

Professor Francisco Valdes asks whether Professor Bell challenged or recognized the permanence of Euroheteropatriarchal ideologies—the dominance of a perceived insider narrative that excludes the experience of critical outsider voices.¹² In looking at some of Bell's lesser-known writings, Professor Valdes sees that, in Bell's scholarship as of some years ago, Professor Bell has recognized the intersection of biases (moving from racial realism to critical realism on multiple axes based on personal praxis), but perhaps less robustly than he might have. However, in his writings and life, he also contributed room for dialogue, and allows today for critical outside voices to work together to build against hegemonic injustice.

10. Danné L. Johnson, *What's Love Got To Do With It? Interest-Convergence As A Lens To View State Ratification Of Post Emancipation Slave Marriages*, 36 W. NEW ENG. L. REV. 140 (2014).

11. Sudha Setty, *Targeted Killings and the Interest Convergence Dilemma*, 36 W. NEW ENG. L. REV. 166 (2014).

12. Francisco Valdes, *Critical Race Action: Queer Lessons and Seven Legacies from the One and Only Professor Bell*, 36 W. NEW ENG. L. REV. 106 (2014).

The articles range from the 19th century to the hegemonic war on terror; from Latin@ identity as a disruptive force, to recognition of subjugated identities allowing for the creation of coalitions to end oppression. There is great potential for progress, but the question of the value of progress in the face of retrenchment remains.

Professor Bell ended his introduction to *Faces at the Bottom of the Well* saying: “If we are to seek new goals for our struggles, we must first reassess the worth of the racial assumptions on which, without careful thought, we have presumed too much and relied on too long. Let’s begin.”¹³

As we look at the value to the discussion of new understandings of our national history, to the recognition of commonalities, to the stories of choice and responsibility, Professor Bell’s work enriches our own analyses and understandings. As difficult as the struggles may be, as little room as we may see for a just result where power concedes nothing without a demand,¹⁴ we have a starting point of challenging the structures that call for the harm to continue, where our identities, perceived or felt, have been subject to the vicissitudes of another’s will.

Let’s begin.

13. BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 3, at 14.

14. See Frederick Douglass, *The Significance of Emancipation in the West Indies: An Address Delivered in Canandaigua, New York, on 3 August 1857*, in 3 *THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS* 183, 204 (John W. Blassingame ed., 1985).

This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.

Id.